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3 BEFORE THE SHORELINES HEARINGS BOARD  
4 STATE OF WASHINGTON

5 WILLIAM PERCICH and DAVID )  
6 MOORHOUSE. )

7 Appellants. )

SHB NO 94-27

8 v )

ORDER OF DISMISSAL

9 TOWN OF FRIDAY HARBOR )

10 Respondent )  
11

12 This matter comes before the Shorelines Hearings Board on a motion for  
13 summary judgment filed by the Town of Friday Harbor Oral argument on the motion  
14 was heard on September 23 1994 The Board was comprised of Robert V Jensen,  
15 Richard C Kelley, James A Tupper, Jr , Bobbi Krebs-McMullen, Michael Shelton and  
16 Robert Landles Mr Tupper presided for the Board

17 Court reporting services were provided by Gene Barker and Associates of  
18 Olympia, Washington

19 Appellants appeared through their attorney Robert Jackson The Town of Friday  
20 Harbor appeared through its attorney M Colleen Clancy

21 In addition to oral argument by counsel the Board reviewed Respondent's  
22 Memorandum in Support of Summary Judgment, Appellants' Memorandum in  
23 Opposition to Respondent's Motion for Summary Judgment, Respondent's Reply to  
24 Appellants' Memorandum in Opposition to Motion for Summary Judgment together with  
25 all attachments and exhibits to these pleadings Based on this review, the Board enters  
26 the following ruling

27 ORDER OF DISMISSAL  
SHB NO 94-27

1 This case involves the development of property located on the corner of Front and  
2 Spring Streets within the downtown Friday Harbor waterfront. Development of this site  
3 has been at issue in three previous appeals to this Board. The third appeal, SHB No. 92-  
4 23, was brought by the current appellants. They had obtained Shoreline Substantial  
5 Development Permit No. 41 in July 1990, to construct a plaza for retail and commercial  
6 development. In 1992, with most of the building completed, they sought to modify the  
7 permit under FHMC § 19.08.140 to expand the list of permitted tenants contained in the  
8 permit. The town council denied the requested modification and an appeal was filed with  
9 this Board. On August 13, 1992, the Board granted the appeal and ordered Friday Harbor  
10 to issue a modified permit.

11 The appellants are again before the Board on an appeal of the denial of modified  
12 permit. In 1993 the appellants constructed a patio or deck along the Spring Street side of  
13 the building. They placed planters, tables and chairs on this decking and a portion of the  
14 covered walkway facing Front Street. Appellants maintain that these facilities are  
15 available for use by the general public and not restricted to use by patrons of businesses  
16 within the building. In late 1993 the town advised appellants that the use of the  
17 walkways for food and beverage service constituted a violation of the conditions in  
18 Permit No. 41. In response, appellants filed another application for modification which  
19 was denied by the town council. That denial is the subject of the current appeal.

20 Modification was sought under the Friday Harbor procedure for modified permits  
21 which provides

22 All work done pursuant to a substantial development permit shall be  
23 consistent with the approved plans. A substantial development permit  
24 may be modified by the town council if it is determined that such  
25 modification does not substantially change the uses or otherwise increase  
26 the impact of the development upon the shoreline.

27 FHMC § 19.08.140

Chapter 19 of the FHMC predates the current Friday Harbor Shoreline Master Program ("FHSMP") as approved by the Department of Ecology in 1990. While Chapter 19 has not been incorporated in the current master program, it has not been repealed by the town council. The town represents that the permit application now on appeal is not an application for a revised permit that would be subject to the criteria for revisions to a substantial development permit under WAC 173-14-064(2).

The initial question presented to the Board is whether the issuance of a modified substantial development permit can be consistent with the SMA. This issue was not addressed by the Board in SHB No. 92-23. The provision for modified permits is unique to the Friday Harbor Municipal Code. The SMA and its implementing regulations do not authorize such permits. The Act does, however, require that all substantial development permits be consistent with both the applicable master program and the provisions of the SMA. RCW 90.58.140(2)(b). Consistent with the provisions of the Act are Department of Ecology regulations setting forth rules and criteria that should be adopted as part of local master programs and applied to each permit application. RCW 90.58.140(3) and RCW 90.58.200.

The provisions of the SMA and precedent of this Board do not contemplate modified permits. Department of Ecology regulations limit the use of revised shoreline permits to those situations where the proposed revision is within the scope and intent of the original permit. WAC 173-14-0064(1). Conversely, if a proposed revision exceeds the scope and intent of the original permit, a new permit application is required. WAC 173-14-064(3). In permit revision cases before this Board in the past, the Board has employed a very narrow scope of review. In general, we have looked only to ascertain whether the proposed revision meets the enumerated criteria for revisions at WAC 173-14-064(2). Department of Ecology v. Island County, SHB No. 216. Where a permit revision exceeds the original scope and intent, the Board consistently requires a new permit application. See, e.g., Larkin v. Department of Ecology, SHB No. 84-21.

1 The modified permit provision of the Friday Harbor municipal code  
2 inappropriately allows a third means of amending the terms and conditions of a shoreline  
3 permit. We conclude that modified permits issued under FHMC § 19.08.140 are  
4 inconsistent with the FHSMP and the SMA.

5 On a substantive level, FHMC § 19.08.140 allows the town council to modify a  
6 permit based on a standard that is inconsistent with the applicable criteria for review of a  
7 substantial development permit. Under FHMC § 19.08.140 the town council may only  
8 assess whether the proposed change substantially changes the use or otherwise increases  
9 the impact of a development. By virtue of WAC 173-14-064(3), if the proposal violates  
10 any of the criteria of WAC 173-14-064, the town council is required to address a  
11 proposed modification of a substantial development as if it was presented with a new  
12 permit application. The town must then consider whether the proposed use is consistent  
13 with the policies and procedures of the SMA, the provisions of chapter 173-14 WAC, and  
14 the master program. WAC 173-14-100. The town's master program requires no less of a  
15 review for new substantial development permits. FHSMP § 2.05. The depth of review  
16 required when a proposed change does not fall under the revision criteria is thwarted by  
17 the limited scope of review afforded by the modification ordinance.

18 FHMC § 19.08.140 also suffers from significant procedural deficiencies when  
19 applied to situations where a new permit application would be required under WAC 173-  
20 14-064(3). The requirements for public notice and comment for a permit application are  
21 set forth at RCW 90.58.140(4) and WAC 173-14-070. At a minimum, notice of a permit  
22 application must be published in a newspaper of general circulation once a week for two  
23 consecutive weeks. WAC 173-14-070(4) additionally requires that notice of the permit  
24 application must be either posted at the site of the proposed development or mailed to  
25 property owners within the vicinity of the site. The notice must include a statement that  
26 interested parties may submit written comments within thirty days of the final newspaper  
27 publication. Interested parties are afforded the right to request notice of the final action.

1 on the permit application Friday Harbor has adopted these procedures in section 11 02  
2 of the FHSMP

3 The issuance of modified permits under FHMC § 19 08 140 is inconsistent with  
4 the procedural provisions of the SMA FHMC § 19 08 140 allows the town council to act  
5 on a permit modification application without the opportunity for public notice and  
6 comment required by the SMA and the town's own master program That discretion is in  
7 direct conflict with the requirements of WAC 173-14-064(3) that a revision request  
8 exceeding the scope and intent of the original permit be treated as a new permit  
9 application The underlying rationale for limiting the application of permit revisions is to  
10 foster this important policy in shoreline management When processing a proposed  
11 revision the local government has presumably afforded the public a full opportunity to  
12 comment on the original application Since the revision must be within the scope and  
13 intent of the original permit, there is no requirement for additional public comment That  
14 is not, however, the case where there is a proposed change in use At that point the public  
15 is entitled to a new opportunity to participate in the process The right of the public to  
16 participate is fundamental to the SMA RCW 90 58 020 and 140 This express mandate  
17 of the SMA is not met under the language of FHMC § 19 08 140 which does not provide  
18 for any public notice and comment

19 Without addressing the merits of the matter now on appeal, this Board declines to  
20 review either a grant or denial of a permit modification under FHMC § 19 08 140 on the  
21 grounds that such permits are inconsistent with the provisions of the FHSMP and the  
22 SMA This matter shall accordingly be remanded to Friday Harbor for reconsideration as  
23 a new substantial development permit or a permit revision

24 Based on the foregoing ruling, the Board enters the following

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IT IS HEREBY ordered this matter is dismissed without prejudice and remanded  
to the Town of Friday Harbor for action in accordance with the Board's ruling

DONE this 28<sup>th</sup> day of October, 1994.

SHORELINES HEARINGS BOARD

  
ROBERT V. JENSEN, Chairman

  
RICHARD C. KEZLEY, Member

  
JAMES A. TUPPER, JR., Member

  
BOBBI KREBS-McMULLEN, Member

  
MIKE SHELTON, Member

  
BOB LANDLES, Member